

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 04, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

No. 1:19-CR-02032-SMJ-01
1:19-CR-02032-SMJ-02

Plaintiff,

v.

JAMES DEAN CLOUD (01) and
DONOVAN QUINN CARTER
CLOUD (02),

**ORDER GRANTING SECOND
MOTION TO CONTINUE AND
RULING ON PRETRIAL
MOTIONS**

Defendants.

**AMENDED¹ CASE
MANAGEMENT ORDER**

Before the Court, without oral argument, are Defendant James Dean Cloud’s (01) Unopposed Motion to Continue, ECF No. 99, in which Defendant Donovan Quin Carter Cloud (02) joins, ECF No. 107, as supplemented by Defendant Cloud (02)’s Proposed Case Management Deadlines, ECF No. 112 (collectively, the “Joint Motion to Continue”). Also before the Court, without oral argument, are Defendant Cloud (02)’s Motion *In Limine* and Request Additional Time to Request a *Daubert* Hearing, ECF No. 93, Motion for Production of 404(b) Evidence, ECF No. 94,

¹ This Order amends and supersedes in part the Court’s most recent July 22, 2019 Case Management Order, ECF No. 79.

**ORDER GRANTING SECOND MOTION TO CONTINUE AND RULING ON
PRETRIAL MOTIONS - 1**

1 Motion for Bill of Particulars, ECF No. 95, and Response to the Government's
2 Notice of Intent to Introduce Evidence Pursuant to Fed. R. Evid. 404(b), ECF No.
3 103, which the Court construes as a motion *in limine* to exclude the evidence
4 identified by the Government's Notice of Intent to Introduce Evidence Pursuant to
5 Fed. R. Evid. 404(b), ECF No. 92. Having considered the motions and related
6 filings, as well as the record in this matter, the Court is fully informed, and sees no
7 need for oral argument. The Court addresses each of the motions in turn.

8 **A. Joint Motion to Continue**

9 Counsel for both Defendants request a continuance of the pretrial motions
10 filing deadline, the pretrial conference, and the trial, to allow more time to obtain
11 and review discovery, investigate the case, retain experts as needed, prepare pretrial
12 motions, and prepare for trial. ECF Nos. 99, 107 & 112. Both Defendants support
13 the motion for the articulated reasons. ECF Nos. 113, 116. The Government is not
14 opposed to the requested continuance. ECF No. 99 at 1; ECF No. 101 at 2. The
15 parties have reached agreement on proposed case management deadlines, including
16 for the pretrial conference and trial date. ECF No. 112.

17 The Indictment was filed for Defendants (01) and (02) on June 11, 2019. ECF
18 No. 17. The Superseding Indictment was filed on July 17, 2019, ECF No. 59. John
19 B. McEntire appeared on behalf of Defendant Cloud (01) on June 11, 2019, ECF
20 No. 15, and Lorinda M. Youngcourt appeared on his behalf on July 9, 2019, ECF

1 No. 49. Richard A. Smith and Michael S. Prince appeared on behalf of Defendant
2 Cloud (02) on June 19, 2019. ECF Nos. 33, 34.

3 To ensure all defense counsel are afforded adequate time to obtain and review
4 discovery, investigate the case, retain experts as needed, prepare pretrial motions,
5 and prepare for trial, the Court grants the motion, extends the pretrial motions
6 deadline, and resets the currently-scheduled pretrial conference and trial dates. The
7 Court finds that Defendants' continuance requests are knowing, intelligent, and
8 voluntary, and that the ends of justice served by granting a continuance outweigh
9 the best interest of the public and Defendants in a speedy trial. The delay resulting
10 from the Joint Motion to Continue is therefore excluded under the Speedy Trial Act.

11 Counsel are advised that successive continuance requests will be closely
12 scrutinized for the necessity of more time to effectively prepare, taking into account
13 the exercise of due diligence.

14 Having considered the parties' proposed case schedule and deadlines, the
15 Court below enters an Amended Case Management Order ("CMO"), which sets
16 forth the deadlines, hearings, and requirements the parties will observe in this
17 matter. To the extent this Order conflicts with any previously-entered Orders in this
18 matter, this Order shall govern. All counsel are expected to carefully read and abide
19 by this Order and such provisions of the current CMO which have not been
20 superseded hereby. The Court will grant relief from the requirements in this Order

1 only upon motion and good cause shown.

2 **B. Defendant Cloud (02)'s Motion *In Limine* and Request Additional Time
3 to Request a *Daubert* Hearing**

4 Defendant Cloud (02) filed a motion requesting several forms of pretrial
5 relief, ECF No. 93. The Court briefly addresses each in turn.

6 **1. Motion to Extend the Deadline to Request a *Daubert* Hearing**

7 Defendant Cloud (02) requests an extension of the deadline to request a
8 *Daubert* hearing set by the Court's July 22, 2019 Amended Case Management
9 Order, ECF No. 79. ECF No. 93 at 2–3. The Court now grants the Joint Motion to
10 Continue, which includes an extension of the deadline to request a *Daubert* hearing.
11 Accordingly, the Court denies this aspect of the motion as moot.

12 **2. Motion to Exclude “Overview Testimony”**

13 Defendant Cloud (02) moves to prohibit the Government from introducing
14 prohibited hearsay at trial by eliciting “overview testimony” from investigating
15 police officers. ECF No. 93 at 3–4. The Court finds that it would be inappropriate
16 to weigh the merits of this motion at this early stage, while discovery is still ongoing
17 and the case may continue to evolve; resolving the issue will be more appropriate
18 closer to the new April 27, 2020 trial date. Accordingly, the Court reserves ruling
19 on this aspect of the motion. Either Defendant may renew the motion ahead of the
20 newly-scheduled pretrial conference.

1 **3. Motion to Exclude Statements of Co-Conspirators**

2 Defendant Cloud (02) also moves to exclude the statements of potential co-
3 conspirators “until it is determined that any proposed statement meets the
4 requirements of FRE 801(d)(2).” *Id.* at 4. This aspect of the motion appears to do
5 no more than ask the Court to enforce the Federal Rules of Evidence. Moreover,
6 resolving any issues related to the admissibility of co-conspirator statements will be
7 more appropriate closer to the new pretrial conference date. Accordingly, the Court
8 reserves ruling on this aspect of the motion. Either Defendant may renew the motion
9 ahead of the newly-scheduled pretrial conference.

10 **4. Motion to Exclude Testimony of Undisclosed Expert Witnesses**

11 Defendant Cloud (02) also moves to “prohibit any opinion testimony by any
12 person who has not previously been identified as an expert and/or who the
13 Government has failed to provide discovery.” *Id.* at 5. As the deadline to produce
14 discovery and identify expert witnesses is now extended, the Court denies this
15 aspect of the motion as moot.

16 **5. Motion to Exclude Testifying Witnesses from the Courtroom**

17 Defendant Cloud (02) also moves to exclude testifying witnesses from the
18 Courtroom during trial. The Court finds that resolving this aspect of the motion will
19 be more appropriate closer to the new April 27, 2020 trial date. Accordingly, the
20

1 Court reserves ruling on this aspect of the motion. Either Defendant may renew the
2 motion ahead of the newly-scheduled pretrial conference.

3 **6. Motion for Leave to File Additional Motions *In Limine***

4 Defendant Cloud (02) also “reserves the right to file additional motions *in*
5 *limine* should the need arise prior to trial.” *Id.* at 6. As the deadline to file motions
6 *in limine* is now extended, the Court denies this aspect of the motion as moot.

7 **C. Motion for Production of 404(b) Evidence**

8 Defendant Cloud (02) moves the Court for an order compelling the
9 Government to produce and designate evidence it intends to offer at trial under
10 Federal Rule of Evidence 404(b). ECF No. 94. On September 10, 2019, the
11 Government filed a notice of its intent to offer some evidence potentially
12 implicating Rule 404(b). ECF No. 92. For this reason, and because the deadline to
13 file 404(b) notices is now extended, the Court denies this motion as moot.

14 **D. Motion for Bill of Particulars**

15 Defendant Cloud (02) moves for a bill of particulars as to Count 4 of the
16 Superseding Indictment, charging both Defendants with kidnapping in violation of
17 18 U.S.C. § 1201(a)(2). ECF No. 95 at 5. Specifically, Count 4 charges that:

1 On or about June 8, 2019, in the Eastern District of
2 Washington, the Defendants, DONOVAN QUINN
3 CARTER CLOUD and JAMES DEAN CLOUD, both
4 Indians, who were not parents, grandparents, brothers,
5 sisters, aunts, uncles, or individuals having legal custody
6 of Minor A, did unlawfully kidnap, abduct, confine, and
seize a person identified as Minor A, who had not then
attained the age of eighteen years, all within the
boundaries of the Yakama Nation Indian Reservation, in
Indian Country; in violation of 18 U.S.C. §§ 1201(a)(2),
(g)(1), and 3559(f)(2), 2.

7 ECF No. 59 at 3. Defendant Cloud (02) argues that Count 4 “does not provide the
8 Defendant reasonable certainty of the nature of the accusation against him” because
9 it omits the statutory language that he “h[eld] for ransom or reward or otherwise”²
10 the identified minor victim. *Id.* at 4 (citing 18 U.S.C. § 1201(a)).

11 Under Federal Rule of Criminal Procedure 7(f), the Court may order the
12 Government to produce a bill of particulars “to minimize the danger of surprise at
13 trial and to provide sufficient information on the nature of the charges to allow
14 preparation of a defense.” *United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir.
15 1984) (citing *Will v. United States*, 389 U.S. 90, 98–99 (1967)). “These purposes
16

17 _____
18 ² 18 U.S.C. § 1201(a)(2) provides in full: “Whoever unlawfully seizes, confines,
19 inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward
or otherwise any person, except in the case of a minor by the parent thereof, when[]
any such act against the person is done within the special maritime and territorial
jurisdiction of the United States[] shall be punished by imprisonment for any term
of years or for life and, if the death of any person results, shall be punished by death
or life imprisonment.”

1 are served if the indictment itself provides sufficient details of the charges and if
2 the Government provides full discovery to the defense.” *Id.*

3 Kidnapping under § 1201(a)(2) is a general intent crime, and therefore, “the
4 prosecution need not prove that the defendant committed the kidnapping for any
5 particular purpose.” *United States v. Sneezer*, 983 F.2d 920, 922 (9th Cir. 1992).
6 Thus, although the words “held for ransom or reward or otherwise” are not
7 “surplusage, . . . ‘involuntariness of seizure and detention . . . is the very essence of
8 the crime of kidnaping.’” *Gawne v. United States*, 409 F.2d 1399, 1403 (9th Cir.
9 1969) (quoting *Chatwin v. United States*, 326 U.S. 455, 464 (1946)). Moreover, as
10 one court held, “it is difficult to see how the addition of the words ‘for ransom or
11 reward or otherwise’ would have added anything to the indictment because
12 obviously ‘otherwise’ comprehends any purpose at all.” *Clinton v. United States*,
13 260 F.2d 824, 825 (5th Cir. 1958) (cited approvingly in *Gawne*, 409 F.2d at 1403)).
14 The same is true here, and thus Defendant Cloud (02)’s argument that “the
15 Government has failed to even include [this] statutory language in the indictment”
16 is unavailing. ECF No. 108 at 2.

17 The parties agree that the Government has produced more than 4000 pages
18 of discovery, and the Government contends that “all known police reports
19 documenting the carjacking/kidnapping have been provided in discovery.” ECF No.
20 100 at 4. The Government also states that it continues to produce discovery “upon

1 receipt." ECF No. 101 at 1. Even so, Defendant Cloud (02) suggests that "a bill of
2 particulars identifying the alleged 'holding' and motive and purpose of the
3 [kidnapping] is particularly appropriate in this case given the similarity of [the] facts
4 and circumstances regarding the Government's charges of carjack and kidnap."
5 ECF No. 108 at 2.

6 The Court finds that a bill of particulars is unnecessary. For one thing, as set
7 out above, the purpose or motivation for which Defendants engaged in the alleged
8 kidnapping is not an essential element of the crime charged, and therefore additional
9 detail as to the Government's theory is unnecessary. This result is unchanged by
10 any potential overlap between the kidnapping and carjacking charges. More
11 importantly, the Court finds that a bill of particulars is unnecessary where, as here,
12 the indictment provides sufficient detail as to the essential elements of the
13 kidnapping charge, and where the Government has provided Defendants with full
14 discovery and will continue to do so. *Mitchell*, 744 F.2d at 705 (citing *Will*, 389
15 U.S. at 98–99). Accordingly, Defendant Cloud (02)'s Motion for Bill of Particulars,
16 ECF No. 95, is denied.

17 **E. Motion to Exclude 404(b) Evidence**

18 Finally, Defendant Cloud (02) filed a Response to the Government's Notice
19 of Intent to Introduce Evidence Pursuant to Fed. R. Evid. 404(b), ECF No. 103. The
20 Court construes this as a motion *in limine* to exclude the evidence identified by the

1 Government's Notice of Intent to Introduce Evidence Pursuant to Fed. R. Evid.
2 404(b), ECF No. 92.

3 The Government has indicated its intent to offer evidence of events at an
4 address in White Swan, Washington, the scene of several alleged homicides. ECF
5 No. 92 at 1–5. The Government contends that such evidence is “inextricably
6 intertwined” with evidence of the crimes for which Defendants are charged—
7 kidnapping and carjacking—because the Government contends the charged crimes
8 were motivated by a desire to flee the scene of the uncharged homicides. *Id.* The
9 Government also contends that the evidence is admissible over a Rule 404(b)
10 objection because it will be used to “establish motive, opportunity, intent, and plan.”
11 *Id.* at 5.

12 Defendant Cloud (02) objects that evidence from the scene of the uncharged
13 homicides should be excluded because it is not inextricably intertwined with the
14 kidnapping and carjacking charges; because the evidence does not meet the test for
15 admissibility under Rule 404(b); and because the probative value of the evidence is
16 outweighed by its prejudicial effect. ECF No. 103 at 1–6.

17 The Court finds that at this time, ruling on the admissibility of evidence from
18 the scene of the uncharged homicides would be premature. Discovery is ongoing,
19 and as the case evolves, the nature, import, and admissibility of the evidence in
20 question may change. Resolving this issue, to the extent it remains necessary to do

1 so, would be more appropriate at the newly set pretrial conference, where an
2 evidentiary hearing may be necessary. Accordingly, the Court reserves ruling on
3 this motion. Either Defendant may renew the motion ahead of the newly-scheduled
4 pretrial conference.

5 **Accordingly, IT IS HEREBY ORDERED:**

6 **1. The Joint Motion to Continue, ECF Nos. 99, 107 & 112 is**
7 **GRANTED.**

8 The Court finds, given defense counsel's need for time to obtain and review
9 discovery, investigate the case, retain experts as needed, prepare pretrial motions,
10 and prepare for trial, that failing to grant a continuance would result in a miscarriage
11 of justice and would deny defense counsel the reasonable time necessary for
12 effective preparation, taking into account the exercise of due diligence. *See* 18
13 U.S.C. § 3161(h)(7)(B)(i), (iv). The Court, therefore, finds the ends of justice served
14 by granting a continuance in this matter outweigh the best interest of the public and
15 Defendants in a speedy trial. *See* 18 U.S.C. § 3161(h)(7)(A).

16 **Original CMO.** Counsel must review the provisions of the original June 18,
17 2019 CMO, ECF No. 31, and abide by those procedures which remain in full force
18 and effect and are incorporated herein except for the new compliance deadlines in
19 the following Summary of Amended Deadlines.

20 **Pretrial Conference.** The pretrial conference currently set for October 8,

1 2019 is **STRICKEN** and **RESET** for **March 17, 2020** at **9:30 AM** in **YAKIMA**.

2 At this hearing, the Court will hear **ALL** pretrial motions that are noted for oral
3 argument.

4 Pretrial conferences are scheduled to last no more than **thirty (30) minutes**,
5 with each side allotted **fifteen (15) minutes** to present their own motions and resist
6 motions by opposing counsel. If any party anticipates requiring longer than fifteen
7 (15) minutes, that party must notify the Courtroom Deputy at least seven (7) days
8 prior to the hearing. **Any party who fails to provide this notice will be limited to**
9 **fifteen (15) minutes.**

10 **Trial.** The current trial date of October 28, 2019 is **STRICKEN** and **RESET**
11 to **April 27, 2020**, at **9:00 AM** in **YAKIMA**. The **final** pretrial conference will
12 begin at **8:30 AM**.

13 Pursuant to 18 U.S.C. § 3161(h)(7)(B)(i) and (iv), the Court **DECLARES**
14 **EXCLUDABLE from Speedy Trial Act calculations** the period from **September**
15 **14, 2019**, the date defense counsel moved to continue, through **April 27, 2020**, the
16 new trial date, as the period of delay granted for adequate preparation by counsel.

17 **Summary of Amended Deadlines**

18 Disclose all discovery	January 16, 2020
19 Provide alibi notices	January 16, 2020
20 File Rule 404(b) and 609 notices	January 16, 2020
21 Produce Rule 16 expert witness summaries	January 23, 2020

All pretrial motions, including discovery motions, <i>Daubert</i> motions, and motions <i>in limine</i> , filed	February 18, 2020
PRETRIAL CONFERENCE <i>Deadline for motions to continue trial</i>	March 17, 2020 9:30 AM - YAKIMA
CIs' identities and willingness to be interviewed disclosed to Defendant (if applicable)	April 13, 2020
Grand jury transcripts produced to Defendant Case Agent: CIs: Other Witnesses:	April 13, 2020 April 13, 2020 April 13, 2020
Exhibit lists filed and emailed to the Court	April 20, 2020
Witness lists filed and emailed to the Court	April 20, 2020
Trial briefs, jury instructions, verdict forms, and requested <i>voir dire</i> filed and emailed to the Court	April 17, 2020
Exhibit binders delivered to all parties and to the Court	April 17, 2020
Delivery of JERS-compatible digital evidence files to the Courtroom Deputy	April 17, 2020
Trial notices filed with the Court	April 17, 2020
Technology readiness meeting (in-person)	April 20, 2020
JURY TRIAL	April 27, 2020 9:00 AM - YAKIMA

2. Defendant Cloud (02)'s Motion *In Limine* and Request Additional Time to Request a *Daubert* Hearing, ECF No. 93, is **DENIED IN PART AS MOOT** and the Court **RESERVES RULING** in part, as explained above, subject to either Defendant's ability to renew the motions at the time of the rescheduled pretrial conference.
3. Defendant Cloud (02)'s Motion for Production of 404(b) Evidence,

ORDER GRANTING SECOND MOTION TO CONTINUE AND RULING ON PRETRIAL MOTIONS - 13

1 **ECF No. 94, is DENIED AS MOOT.**

2 4. Defendant Cloud (02)'s Motion for Bill of Particulars, **ECF No. 95**, is
3 **DENIED.**

4 5. The Court **RESERVES RULING** on Defendant Cloud (02)'s
5 Response to the Government's Notice of Intent to Introduce Evidence
6 Pursuant to Fed. R. Evid. 404(b), **ECF No. 103**, which the Court
7 construes as a motion *in limine* to exclude the evidence identified by
8 the Government's Notice of Intent to Introduce Evidence Pursuant to
9 Fed. R. Evid. 404(b), ECF No. 92.

10 6. Because the Court has resolved all pending motions set for hearing, the
11 pretrial conference and motions hearings set for October 8, 2019 is
12 **STRICKEN.**

13 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
14 provide copies to all counsel, the U.S. Probation Office, and the U.S. Marshals
15 Service.

16 **DATED** this 4th day of October 2019.

17 
18 _____
18 SALVADOR MENDEZ, JR.
18 United States District Judge